

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of ALEXANDER CLARK III,
Deceased.

JULIE CLARK,

Petitioner-Appellant,

v

RICHARD SIRIANI, Personal Representative of
the Estate of ALEXANDER CLARK III,
FREDERICK CLARK, and ROBERT CLARK,

Respondents-Appellees.

UNPUBLISHED

April 16, 2009

No. 282000

Oakland Circuit Court

LC No. 2006-305129-DE

Before: Zahra, P.J., and O’Connell and K.F. Kelly, JJ.

PER CURIAM.

Petitioner appeals by leave granted from the probate court’s order granting partial summary disposition in favor of respondents Frederick Clark and Robert Clark (“the Clark respondents”). We affirm in part, reverse in part, and remand for further proceedings.

The record suggests that the probate court granted the Clark respondents’ motion for summary disposition pursuant to MCR 2.116(C)(10). A motion for summary disposition under subrule (C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass’n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id.* at 31. Further, we review equitable issues de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

A “[c]onstructive trust is an equitable remedy which the court may impose where the facts justify it.” *In re Swantek Estate*, 172 Mich App 509, 517; 432 NW2d 307 (1988). “A court may impose a constructive trust when necessary to do equity or avoid unjust enrichment.” *Morris Pumps v Centerline Piping, Inc.*, 273 Mich App 187, 202; 729 NW2d 898 (2006).

Constructive trusts are creatures of equity and their imposition makes the holder of the legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest. They are distinguished from express and resulting trusts in that they do not arise by virtue of agreement or intention, but by operation of law. [*Arndt v Vos*, 83 Mich App 484, 487; 268 NW2d 693 (1978).]

A court will impose a constructive trust only when it would be inequitable not to do so. *Id.* “A constructive trust may thus be imposed under any circumstance that renders it unconscionable for the holder of legal title to retain and enjoy the property.” *Morris Pumps, supra* at 202. The party seeking to impose a constructive trust has the burden of proof. *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993).

Here, the probate court declined to impose a constructive trust based on its determination that the funds in the “9713 account” were not traceable to petitioner’s Individual Retirement Account (“IRA”). Petitioner argues that mortgage proceeds in the amount of \$746,029.92 that were deposited into the “5265 account” are identifiable as the product of a \$950,000 premarital contribution to her IRA. She contends that she need only show that the “substantial identity” of the funds in the 9713 account are attributable to her IRA.

As stated in 76 Am Jur 2d, Trusts, § 175, p 230, “[a] constructive trust requires money or property identified as belonging in good conscience to the plaintiff which can clearly be traced to particular funds or property in the defendant’s possession.” (Footnote omitted.) Regarding the concept of tracing, Bogart, Trusts & Trustees (2d ed), § 921, pp 427-429, provides:

The object of this Chapter is to explain when and to what extent tracing is exercisable, assuming that the holder of the property claimed is not a bona fide purchaser. This becomes primarily a question of the sufficiency of identification of the claimed property as either trust property or its product.

Tracing is founded on the idea that the beneficiary or his representative is the owner in equity of the property which is sought to be taken. Ownership connotes a property interest in an identified or identifiable thing. . . .

It is a fundamental principle in the English common law that a change of form in a thing which is owned does not change the ownership. Thus if A owns corn and B wrongfully makes the corn into whiskey, A does not lose his property interest. His ownership is transferred from the original subject to the successor or product. . . .

It is also a commonplace of American legal theory that the owner of a thing is entitled to the product of that which is his. . . . The owner of stock or bonds is entitled to the dividends or interest arising therefrom. So too, the equitable owner of the trust property ought to be and is entitled to that which arises out of the trust property by sale, exchange, or otherwise.

Tracing is available in the case of express, resulting or constructive trusts. Numerous cases exist where the wrongdoer whose conduct is the basis of a claim

for a constructive trust has held successively different items of property as the product of his wrong. [Footnotes omitted.]

In *Michigan Nat'l Bank v American Express Co*, 307 Mich 245, 257; 11 NW2d 875 (1943), quoting *Pollack v Leonard & Braniff*, 112 Okla 276; 241 P 158 (1925), our Supreme Court echoed these concepts:

So long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. The product or substitute has the nature of the original imparted to it. The depositing of trust money in a bank, although it creates the relation of debtor and creditor between the bank and the depositor, does not change its character or relieve the deposit from the trust. It is not the identity of the form, but the substantial identity of the fund itself, which is the important thing.

Petitioner argues that she is the equitable owner of the funds in the 9713 account because the “substantial identity” of the funds in the account is traceable to her IRA as a result of petitioner and decedent withdrawing \$950,000 from her IRA to purchase the Merriweather home. Petitioner’s argument fails because the \$950,000 IRA proceeds were transferred to a bona fide purchaser for value. Bogart, *Trusts & Trustees* (2d ed), § 471, pp 5-6, states that “if the trust property or its product can be traced into the hands of a third party, a constructive trust may be imposed upon the property in the hands of the third party unless he is a bona fide purchaser for value and without notice.” (Footnote omitted.) See also Bogart, *Trusts & Trustees* (2d ed), § 921, p 427 (recognizing that tracing is cut off when the holder of the property claimed is a bona fide purchaser for value).

Here, the property claimed is petitioner’s IRA proceeds. Petitioner’s interest in the proceeds was cut off when petitioner and decedent transferred the proceeds to the sellers of the Merriweather home to purchase the home. The Restatement (First) of Restitution, § 172, pp 691-692, provides:

(1) Where a person acquires title to property under such circumstances that otherwise he would hold it upon a constructive trust or subject to an equitable lien, he does not so hold it if he gives value for the property without notice of such circumstances.

(2) In the Restatement of this Subject such a transferee is called a bona fide purchaser.

Comment a to § 172 states:

This principle is most frequently applied to the situation where a person holds property subject to a constructive trust and transfers it to a person who pays value without notice of the facts which gave rise to the constructive trust; in which case the constructive trust is cut off.

Further, Comment b to Restatement (First) of Restitution, § 173, regarding “value” provides:

If money is paid or other property is transferred or services are rendered as consideration for the transfer of property, the transfer is for value (see Restatement of Trusts, § 298). . . .

Under this authority, petitioner's claim to the IRA proceeds was cut off when she and the decedent transferred the proceeds to the sellers of the Merriweather home. The sellers were unaware of any purported constructive trust regarding the IRA proceeds, which were transferred to the sellers for value. Therefore, the sellers are bona fide purchasers of the IRA proceeds. Consequently, petitioner's claim that the funds in the 9713 account attributable to the mortgage on the home are traceable to her IRA fails, because tracing is inapplicable to claimed property that is in the hands of a bona fide purchaser. Restatement (First) of Restitution § 172, pp 691-692; Bogart, Trusts & Trustees (2d ed), s 921, p 427.

Petitioner also argues that \$60,000 in the 9713 account is traceable to her IRA and that the decedent withdrew this amount without her permission. The evidence shows that petitioner contacted Amy Pratt at Smith-Barney regarding the decedent withdrawing money from her IRA without her permission. Petitioner told Pratt to make sure that her purported signature on letters of authority that the decedent used to withdraw money from her account matched her signature. This conversation occurred on or around May 24, 2006. The evidence also shows that the decedent withdrew \$30,000 from petitioner's IRA on May 24, 2006, and another \$30,000 from the account on May 26, 2006. The decedent deposited these amounts into the 5265 account on the same dates that the funds were withdrawn. After the decedent's death, petitioner transferred \$593,463.16 from the 5265 account to the 9713 account. Accordingly, the "substantial identity" of \$60,000 in the 9713 account is traceable to petitioner's IRA. Because the evidence shows that the decedent withdrew these funds without petitioner's permission, and respondents do not argue to the contrary, a constructive trust pertaining to only \$60,000 of the 9713 account is an appropriate remedy for the decedent's wrongful conversion of the funds. Thus, the probate court erred by declining to impose a constructive trust regarding these funds.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly